

## COMMITTEE AGAINST TORTURE

**R. S. v. Austria**

**30 April 2002**

**Communication No. 111/1998**

**CAT/C/28/D/111/1998**

### VIEWS

*Complainant: Mr. R.S.*

*Represented by: Mr. Richard Soyer, counsel in Vienna, Austria*

*State party: Austria*

*Date of communication: 16 April 1997 (initial submission)*

The Committee against Torture, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 30 April 2002,

Having concluded its consideration of communication No. 111/1998, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having take into account all information made available to it by the author of the communication, his counsel and the State party,

Adopts its Decision under article 22, paragraph 7, of the Convention.

1.1 The complainant is Mr. R. S., an Austrian citizen, at the time of the first submission imprisoned in Vienna, Austria, on a conviction for housebreaking, procuring of prostitution and drug trafficking. He claims to be the victim of violations by Austria of article 13 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3 of the Convention, the Committee transmitted the petition to the State party on 11 January 1999.

### Facts as submitted by the complainant

2.1 On 30 July 1996, the complainant was questioned by police officers at the Leopoldstadt District Police station of the Vienna Federal Police Directorate. While the complainant was questioned by officers of one investigation team, three officers entered the room and brought the complainant into the office of one of them. The officers of the investigation team protested against the complainant's transfer, because they had not yet finished their interrogation. Shortly after the complainant had been brought into the other office, he was found outside the office with three bleeding injuries on his right lower leg. The complainant was examined by a medical officer of the police and photos of the injuries were taken. On 1 August 1996, the complainant was transferred by his private doctor to hospital for further examinations that were undertaken on 2 August 1996. The complainant was released immediately. The report of the hospital, submitted by the complainant, documented injuries of the right lower leg and a slightly swollen nose.

2.2 On 9 August 1996, the Vienna Federal Police Directorate sent a report on the facts of the case and the allegations of the complainant that he had been ill-treated to the Public Prosecutor's Office. On 20 August 1996, the Public Prosecutor instituted court proceedings against the three police officers charging them with mistreatment of a prisoner and attempted coercion.

2.3 The first court hearing took place on 7 October 1996. On 6 November 1996, the complainant's trial attorney proposed to the court and to the prosecutor that an examining judge be assigned, in accordance with a decree by the Federal Ministry of Justice, to complete the preliminary investigation carried out by the Federal Police Directorate. This proposal was rejected by the court and the prosecutor. On 25 November 1996, the three police officers were acquitted. On 10 March 1997, the prosecutor withdrew his appeal. It is submitted that, therefore, the decision of the court is final.

### The complaint

3.1 The complainant claims that on 30 July 1996 he was subjected to ill-treatment by three police officers while being questioned at the Leopoldstadt District Police station of the Vienna Federal Police Directorate. Allegedly, one police officer made him fall to the ground and then kicked him. The complainant alleges further that this police officer intentionally kicked him and stepped on his right shin, which was already injured<sup>1</sup>. As a result the wound started to bleed. When the complainant stood up his face was slapped by another police officer. He was then told to make a confession. The complainant states that a fourth police officer was present in the room, but that he did not participate in the ill-treatment.

3.2 The complainant claims that at the first court hearing on 7 October 1996 before the Vienna Regional Criminal Court, serious deficiencies in the preliminary inquiry appeared. In particular, the investigations did not attempt to identify the fourth person in the interrogation room, despite the fact that the testimony of that person would have been essential to determining the facts.

3.3 The complainant contends that the preliminary inquiries lacked the necessary impartiality, because they were carried out by the police and, therefore, constituted a breach of article 13 of the Convention. Impartial investigations would have identified the "fourth person".

3.4 The complainant further submits that there is no legal basis in Austrian law for preliminary police inquiries such as the one carried out in the present case, although such inquiries are frequently conducted in Austria. Neither a magistrate's preliminary investigation nor a legal preliminary inquiry, both provided for in the Code of Criminal Procedure, was carried out.

3.5 Finally the complainant submits that the only domestic remedy still available is a civil action (*Amtshaftungsklage*). Such an action, however, would not be practicable, because in the absence of a thorough criminal investigation a civil action would fail.

#### State party's observations on admissibility

4.1 On 20 May 1999, the State party submits that the case should be declared inadmissible. The State party states that the interrogation of the complainant by the first investigation team was interrupted when the officer assigned to the case at the police station had him brought into his office to be examined by the medical officer of the Vienna Federal Police Directorate in order to determine whether his health and state of mind were impaired as a result of drug consumption.

4.2 After being examined by the medical officer, the complainant told another official of the station (Colonel P.) that he had been ill-treated by the officer who had questioned him, the medical officer and other police officer. Colonel P. immediately informed the head of the police station of the complainant's allegations. The latter phoned, without delay, the President of the Vienna Federal Police Directorate and the Director of the Criminal Investigations Office (*Sicherheitsbüro*) and requested them to take action. The Criminal Investigations office immediately opened an investigation. On the same day, only about one and a half hours after the complainant had made the allegations, he was taken to the Criminal Investigations Office and questioned at length.

4.3 The accused police officers and Colonel P. were interrogated extensively on 31 July and 1 August 1996. Five other police officers were also questioned thoroughly by officers of the Criminal Investigations Office on 2, 5 and 6 August 1996. The Criminal Investigations Office also tried, unsuccessfully, to find out whether a fourth person had been present during the alleged ill-treatment.

4.4 The Criminal Investigations Office submitted a Statement of Facts to the Vienna Public Prosecutor's Office on 9 August 1996 reporting on the results of its investigations. The public prosecutor filed charges against the accused police officers with the Vienna Regional Criminal Court on 20 August 1996 for having inflicted suffering on and trying to coerce a prisoner. This information arrived at the Vienna Regional Criminal Court on 28 August 1996.

4.5 The Criminal Investigations Office continued its inquiries and found that a fourth person (G.W.) had come into the office where the complainant was being questioned. That person was an official from the Vienna city administration who testified that he had stayed in the office for no more than one or two minutes and that during this time there had been no signs of any ill-treatment of the

complainant. This information was submitted to the Public Prosecutor's Office on 26 August 1996.

4.6 On 7 October 1996 the trial against the three police officers began at the Vienna Regional Criminal Court. The complainant and the accused police officers were questioned at length by the court in the presence of the public prosecutor, counsel for the defence and the complainant's representative. A number of witnesses were also questioned, including G.W. who repeated that he had stayed in the office, where the complainant allegedly had been ill-treated, for a short period and had not witnessed any ill-treatment.

4.7 In view of the complainant's denial that G.W. was the fourth person, the Criminal Investigations Office continued its inquiries parallel to the court proceedings. In this regard the complainant was requested, on 30 August 1996, to assist the officers in their efforts, but he replied that he would not answer any summons and did not make any statements when a photograph of G.W. was shown to him.

4.8 The three accused officers were acquitted for lack of evidence by judgement entered on 25 November 1996. The court relied in particular on the medical expert opinion, according to which the ill-treatment alleged by the complainant would have had further consequences which would have been noticed by the medical officer who examined the complainant immediately after the alleged incident. The expert also took the view that the complainant might have inflicted the injury upon himself. An appeal announced by the prosecutor's office was withdrawn on 6 March 1997 and therefore the judgement became final. Subsequent to that, the disciplinary proceedings initiated against one of the three officers were discontinued, whereas another one was acquitted in such proceedings; no disciplinary proceedings were initiated against the third officer.

4.9 The State party claims that the complainant's right under article 13 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to have his case promptly and impartially examined by the competent authorities was fully secured. On the same day the complainant made his allegations, the President of the Vienna Federal Police Directorate was informed and the Criminal Investigations Office started its investigations. The State party notes in this respect that the Criminal Investigations Office and the district police stations belong to different departments of the police and that these departments are independent of each other.

4.10 The fact that the investigation was carried out by the Criminal Investigations Office, which deals with only the more serious crimes, shows that the case was given prompt attention by the competent authorities. The delay between the beginning of investigations and the passing on of information to the Public Prosecutor's Office was the shortest possible and the inquiries carried out afterwards were extensive. Comprehensive investigations were carried out following the complainant's statement that a fourth person had been present during the alleged ill-treatment. This is said to show that the investigating authorities were unbiased and conducted the necessary investigations impartially.

4.11 The results of the investigations would have been the same even if preliminary examinations had been conducted by a court of law or the file had been sent back to the investigating judge. The witnesses and the accused persons questioned by police officers during the preliminary investigations

were again questioned at length by the judge at the trial. Hence, any possible faults of the preliminary investigation would have been corrected at that time. Acceding to the request made on 6 November 1996 by the representative of the complainant to return the file to the investigating judge would have been counterproductive, as it would not have produced any new results and would have created a considerable delay in the criminal proceedings.

4.12 The State party finally contends that the prerequisites enshrined in the Convention have not been fulfilled in the case at issue and considers that the Committee should declare the complaint inadmissible.

#### Comments by the complainant

5. In a letter, dated 28 July 1999, the complainant stated that he had submitted all relevant information.

#### Decision on admissibility

6. At its twenty-third session, in November 1999, the Committee considered the admissibility of the complaint under article 22 of the Convention. In the case under consideration the Committee noted that the communication was not anonymous and that the same matter was not being nor had been examined under another procedure of international investigation or settlement. It also noted that complainant's statement that all domestic remedies had been exhausted. The State party did not contest that statement. Moreover, the Committee considered that the complaint did not constitute an abuse of the right of submission of such communications nor was it incompatible with the provisions of the Convention. It held that the observations submitted by the State party concerned the merits rather than the admissibility issue. The Committee, therefore, found that no obstacles to the admissibility of the complaint existed. Accordingly, the Committee declared the complaint admissible on 18 November 1999.

#### State party's observations on the merits

7.1 In its submission dated 9 June 2000, the State party refers to its previous presentation of the facts of the case.

7.2 In response to a request by the Committee, the State party submits information on the procedure set forth in its domestic legislation to deal with complaints of torture. The State party contends that remedies are available, which in their entirety ensure a prompt and impartial examination of cases of alleged torture that meet the requirements of article 13 of the Convention.

#### Complainant's comments on the merits

8.1 In his submission of 8 January 2002, the complainant makes additional submission confirming his previous claims.

8.2 He submits that notwithstanding the State party's claim that adequate investigations were

undertaken into the allegations of torture, in fact, the Criminal Investigations Office did not take any adequate or effective measure to identify the fourth person who was present during the ill-treatment. The only inquiry mentioned by the State party was the summons of the complainant to appear at the Criminal Investigation Office to identify a photograph, on 30 August 1996. The complainant argues that he refused to cooperate because, at that time, only police investigations were carried out, without participation of judicial authorities, and the complainant did not trust the independence of these investigations.

8.3 The complainant further submits that the Public Prosecutor's Office is not an impartial and independent authority for the investigation of allegations against members of the security organs, as it is subject to orders by the Federal Minister of Justice. The complainant argues that only the investigative judge, whose independence is guaranteed by article 87 of the Federal Constitution of Austria, would be adequate to carry out such investigations. In the present case, the Regional Criminal Court refused to take action through the investigative judge.

#### Consideration of the merits

9.1 The Committee has considered the present complaint in the light of all information made available by the parties, as provided for in article 22, paragraph 4, of the Convention.

9.2 The Committee notes the complainant's claim that the State party was in breach of article 13 of the Convention, because the Regional Criminal Court failed to open a judicial investigation into his allegations of torture. He contends that only a judicial investigation could be considered impartial. In this connection the Committee observes that the decision of the Regional Criminal Court of 25 November 1996 reveals that the court took into account all evidence presented by the complainant and the prosecutor when deciding to acquit the three policemen. The Committee finds that the complainant has failed to substantiate in what way the investigations conducted by the State party were not impartial within the meaning of article 13 of the Convention.

10. The Committee against Torture concludes that the State party did not violate the rule laid down in article 13 of the Convention and that, in the light of the information submitted to it, no finding of any violation of any other provisions of the Convention can be made.

#### Note

<sup>1</sup> This injury was a burn that Mr. R.S. had inflicted on himself when he had been in prison approximately four years before the incident at issue. The burn did not completely heal and still tended to open.